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In the

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SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.

PERMA LIFE MUFFLERS OF ARLINGTON, INC.

PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.

PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.

ROBIN HOOD OF GRAND RAPIDS, INC.

ROBIN HOOD OF MUSKEGON, INC.

REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a

ROBIN HOOD MUFFLER SHOP

REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a

MIDAS MUFFLER SHOP OF BATTLE CREEK.

CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS

PIERCE MUFFLER SHOPS, INC.

APPELLANTS

v.

INTERNATIONAL PARTS CORPORATION

MIDAS, INC.

POWELL MUFFLER CO. INC.

MUFFLER CORPORATION OF AMERICA

NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,

ROBERT M. JAGOB, HAROLD KRIEGER, IRWIN LISS

APPELLEES

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

PETITIONERS' APPENDIX "E" AND APPENDIX "F"

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APPENDIX "E"

1494 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

(Filed May 20, 1966)

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment on Count III.

This is a three-count action arising under the anti-trust laws of the United States. In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks ("Midas" and "Midas Muffler Shop"), illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. In Count III, it is asserted that defendants violated Section 2 of the Clayton 1495 Act, as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available those same prices and services to plaintiffs herein.

On February 25, 1966, this Court granted defendants' motion for summary judgment on Counts I and II, holding that, in the absence of coercion, plaintiffs were *in pari delicto* with defendants, and, thus, unable to maintain the instant action. At the same time we postponed ruling with regard to Count III on plaintiffs' assertion

that interrogatories calling for information relevant to the issues raised therein were objected to by defendants and not answered. The defendants having now supplied the requested information, we may proceed to consideration of defendants' motion.

In support of its motion for summary judgment on Count III, defendants assert that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with other purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the Inter-1496 national system in grade and quality.

Taking the alleged *intra*-brand discrimination first, i.e. sale of Midas parts to Midas dealers at prices lower than those charged plaintiff for Midas parts, it is clear, under Section 2(a) of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) that said statutory provisions apply only where the alleged discrimination is between *competitors*. *Bales v. K. C. Star Co.*, (8th Cir., 1964) 336 F. 2d 439; *National Lead Co. v. F. T. C.*, (7th Cir., 1955) 227 F. 2d 825, 836; *Borden Co. v. F. T. C.*, (7th Cir., 1964) 339 F. 2d 953, 956. Indeed, the late Judge Julius Miner of this Court, on October 16, 1961, ordered plaintiffs herein to amend their complaint so as to properly allege competition with the favored purchasers. Without such allegations, Judge Miner concluded; the complaint was legally insufficient.

Having reviewed the depositions, affidavits, and documents submitted herein, we must hold that no real controversy exists as to the factual elements of this issue,

and that defendants are entitled to summary judgment thereon as a matter of law. That is, each plaintiff has admitted that the geographic "marketing area" in which he sold his Midas products was the "city or county" in which each shop was located, and that no other Midas dealers were located within that region of competition. (Skarupa, Int. V; Skarupa Dep. pp. 187-88, 302-03; Ross Int. V; Ross Dep. pp. 278-79; Pierce, Int. V; Pierce Dep. p. 334; Wheeler, Int. V; Wheeler Supp. Dep., p. 238; Ross Dep. pp. 402-03.) Thus, it is clear from plaintiffs' own testimony that none of the alleged favored purchasers of Midas brand products operated in or near the marketing area controlled by plaintiffs' shops, and that none of said purchasers were ever in competition with plaintiffs.

Plaintiffs have apparently elected not to contest these facts by affidavit or deposition testimony. Rather they seek to defeat defendant's motion for summary judgment by asserting that competition existed between International Parts dealers and plaintiffs, and, that, indeed, there was no difference in grade or quality between the International muffler and the Midas muffler. While this argument is relevant with regard to the second portion of defendants' motion which concerns "inter-brand" discrimination i. e. sale of International brand systems to purchasers at prices more favorable than those extended to plaintiffs in their purchase of Midas products, to be discussed *infra*, it does not contradict defendants' initial contention in any way. That is, defendants have demonstrated that no material fact remains in controversy with regard to intra-brand discrimination between Midas dealers, and that judgment on that issue should be entered in their favor as a matter of law. Accordingly, summary judgment is granted on Paragraphs 24, 24A and 25 of the Amended Complaint, which para-

graphs deal exclusively with the discriminatory sale of Midas parts alone.

We must then turn to Paragraphs 26 through 31 of the Amended Complaint, in which are alleged facts supporting the remainder of Count III. In said paragraphs, plaintiffs contend that price and service discriminations existed between plaintiffs and purchasers of International products. In defense thereto, and in support of their motion for summary judgment, defendants contend that both Midas and International Brand Products were freely available to plaintiffs at the prices offered others, and that a price differential between the two products was justified by an existing dissimilarity in grade and quality. These two assertions, if proven, would constitute a complete defense to the Section 2(a) allegations at issue.

As the Court of Appeals for the Ninth Circuit stated in *Tri-Valley Packing Assn. v. F. T. C.*, (9th Cir., (1964) 329 F. 2d 694, at pp. 703-04, "if the lower price would have been available to the nonfavored buyer . . . the probability of competitive injury due to the fact that the nonfavored buyer paid more . . . is not the result of price discrimination, but of the nonfavored buyer's failure to take advantage of the opportunity, equally available to him, of buying at the same low prices."

Thus, assuming for the purpose of argument that the International Brand parts were identical to the Midas parts, there could be no discrimination within the meaning of Section 2(a), if plaintiffs were able to purchase the former at the lower price, but elected to pay higher prices for the latter. See also *United Banana Co. v. United Fruit Co.*, 1965 Trade Cases Par. 71,522 (D. C. Conn.).

The uncontroverted deposition testimony of plaintiffs clearly demonstrates that prior to the introduction of

the Midas program, plaintiffs Ross (Dep. pp. 7, 8, 10, 14, 21, 24, 229-230), Skarupa (Dep. pp. 29, 293) and Pierce (Dep. pp. 11-14, 19, 22) purchased International parts from defendants, and that, indeed, one of them, Pierce, continued to sell such parts from his retail stores during his operation of Midas shops (Dep. p. 47).

While plaintiffs' counsel baldly asserts that plaintiffs could only buy Midas products, it is clear that on a motion for summary judgment, such unsupported contentions cannot effectively refute the sworn deposition testimony of plaintiffs themselves. As our discussion with regard to the coercion issue present in Counts I and II demonstrated, the evidence is clear and uncontroverted that plaintiffs herein freely elected to sell Midas parts. Whether they were influenced by the guarantee thereon, the "free installation" approach, or the national advertising program is not crucial. What is important, however, is that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. They cannot now, with the wisdom of hindsight, declare that they would have done better with International Parts purchases. The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment.

Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2(a).

While we are fully aware of the recent holding of the United States Supreme Court in *Borden Co. v. F. T. C.*,

(dec. March 23, 1966) 34 U. S. L. Week, reversing the Fifth Circuit Court of Appeals (339 F. 2d 133), and holding that a difference in grade and quality cannot be established "by a label alone or by the label and its 1501 consumer appeal," we are equally satisfied that the facts before us are not that narrow. In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. (See defendants' Answer to Interrogatory 10 for provisions thereof.) Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality.

While we could not preclude plaintiffs from discovery they considered crucially relevant before ruling on defendants' Count III motion, we are satisfied now that Midas trademarks and their validity are irrelevant to the issues raised herein.

Accordingly, the location of defendants for summary judgment in their favor on Count III is granted.

ENTER:

Abraham L. Marovitz
Judge

Dated: May 20, 1966

APPENDIX "F"

1401 IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 60 C 1636)

(Filed February 25, 1966)

MEMORANDUM OPINION

Motion of defendants for summary judgment.

This is a three-count antitrust action arising under Section 1 of the Sherman Anti-Trust Act (Sec. 1, Title 15, U. S. C.), Section 3 of the Clayton Act (Sec. 14, Title 15, U. S. C.) and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, ("Midas" and 1402 "Midas Muffler Shop") illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. Finally, in Count III, it is asserted that defendants violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs herein.

Defendants have moved for summary judgment on all counts. Plaintiffs have opposed said requests, and in addition, have moved to strike portions of that motion.

In accordance with our earlier decisions in *Rayco Mfg. Co. v. Dunn*, (D. C. Ill., 1964), 234 F. Supp. 593, and *Crest Auto Supplies v. Ero Mfg. Co.*, (D. C. Ill., 1965), 246 F. Supp. 224, we must grant summary judgment in favor of defendants on Counts I and II. We have consistently held that a litigant cannot be heard to complain of injuries which resulted from alleged antitrust violations to which it was a *voluntary* party. We find no cause to alter that principle today.

It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in *Rayco* and *Crest*, *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain.

While defendants may well be liable to third parties for antitrust violations, plaintiffs, having participated in the alleged illegal undertaking, may not recover. See *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7th Cir., 1943) 138 F. 2d 967, 971; *Pa. Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co.*, (4th Cir., 1953), 209 F. 2d 131, *cert. den.* 347 U. S. 960; *Kershaw v. Kershaw Mfg. Co.*, (D. C. Ala., 1962) 209 F. Supp. 447, 454, *affd.* (5th Cir., 1964) 327 F. 2d 1002.

Plaintiffs' cases in rebuttal may all be distinguished. In *Ring v. Spina*, (2d Cir., 1945) 148 F. 2d 647, *Mande-*

ville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 (1961); *Bales v. K. C. Star*, (8th Cir., 1964) 336 F. 2d 439; *Emich Motors Corp., et al. v. General Motors Corp.*, 340 U. S. 558 (1951); *Lessig v. Tidewater Oil Co.*, (9th Cir., 1964) 327 F. 2d 459, cert. den. 377 U. S. 993 (1965); and *Osborn v. Sinclair Refinishing Co.*, (4th Cir., 1960) 286 F. 2d 832, the plaintiffs all entered into agreements as "a result of coercion," "in a context of coercion," or because of "coercive conduct on the part of respondents."

In *Rayco, Crest*, and, *a fortiori*, in the instant case, there has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs, quoted from in defendants' brief, and uncontraverted except by counsel's arguments, reveal that 1405 each plaintiff signed franchise agreements freely and voluntarily "as a way of making some real money," (Ross, Dep. pp. 238-240); "So I could reap the benefits of such development," (Skarupa Dep. p. 30); "so as not to invite competition," (Pierce, Defendants' App. 19); because "I was looking for something to get into . . . I answered the ad," (Wheeler Dep. p. 7). It is further undisputed from the record before us that each plaintiff sought to expand his market area after initially gaining a franchise, sought to obtain additional franchises thereafter, and sought to create a monopoly for themselves and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could "coercion" be said to have been a factor herein.

The remainder of plaintiffs' cases were distinguished previously in our earlier opinions on the ground that the

only defense relied on therein was "unclean hands." 1406 That is, in the cited cases the mere fact that a plaintiff had himself violated the antitrust laws, independently of defendant, did not suffice to bar maintenance of the suits. However, when that violation is *in conjunction* with defendant, as here, plaintiff is a party to the illegal arrangement complained of, is *in pari delicto* with defendant, and may not invoke the aid of the law. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, (1951); *Moore v. Mead Service Co.*, 340 U. S. 941 (1951); *Trebuhs Realty Co. v. News Syndicate Co.*, (D. C. N. Y., 1952) 107 F. Supp. 595.

We have repeatedly held that a person who freely assents to an act suffers "no legal injury" if harm results therefrom. We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment as a matter of law on Counts I and II.

While we need not base our decision thereon in view of the foregoing discussion, we further hold from the undisputed facts before us (contested inadequately under

Rule 56 by Counsel's briefed arguments alone) that 1407 the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act.

It is clear from the Complaint that each individual defendant is alleged to be "an officer and/or employee and/or agent of one or more of the corporate defendants (Para. 10, Amended Complaint), and that each corporation is alleged to be a "wholly-owned subsidiary" of International Parts (Para. 11). It is equally clear that the

acts of a corporation's agents are in law the acts of the corporation, that a corporation cannot act except through its agents, and that a corporation cannot conspire with itself. Accordingly, each individual defendant when acting as a corporate agent in his normal employment capacity, could not be involved in a conspiracy with the other individual defendants or the corporation itself. *Nelson Radio & Supply Co. v. Motorola* (5th Cir., 1952) 200 F. 2d 911, 914:

"Surely discussions among those engaged in the management, direction, and control of a corporation 1408 . . . do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act."

There is no indication that the acts of the individual defendants herein were otherwise. Further it is apparent that the multiple corporations before us constituted in fact a single corporation. While we agree with plaintiff that subsidiary corporations may under certain circumstances "conspire" to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here.

The affidavits of Nathan Sherman and Gordon Sherman, chief executives of the defendant corporations, reveal that the manufacture and sale of exhaust system parts at issue, while operated through a multi-corporate structure, was a single business entity. That is, International Parts sold all the products involved herein. Midas, Inc., acted as a corporate shell owning all trade names, trademarks, service marks and franchise agreements. Muffler Corp. of America handled manufacturing for its parent, and Powell Muffler Co., served 1409 as a distributing subsidiary.

There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with

each other or acted in any manner other than as a single integrated business. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act.

Inasmuch as plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman, or the depositions of the plaintiffs indicating that they have no knowledge of facts to support the conspiracy allegations of the Complaint, we must grant summary judgment as to the Sherman Act allegations on this ground as well.

Defendants finally assert that summary judgment should be granted on Counts I and II because the franchise agreement and the merchandising methods employed by defendant in connection therewith were reasonable and

legal means to protect the Midas trade names, trade-1410 marks and service marks licensed to plaintiffs, and

on Count III because there were no discriminations in price or service between plaintiffs and other purchasers in the absence of requisite competition between purchasers, and the requisite identity of commodities of like grade and quality.

Plaintiffs have moved to strike these arguments on the grounds that defendants have refused discovery as to the factual data underlying the trade and service marks which they now seek to use in support of their summary judgment motion. More specifically, it is alleged that defendants, having objected to answering plaintiffs' Interrogatory No. 34, dealing with certain trademarks owned by defendant, and having prevailed on the Court to sustain said objection on the ground that trademarks were not relevant to this action, cannot now rely on a trademark defense in their motion for summary judgment.

We must sustain plaintiffs' motion. While the significance of defendants' trademarks relating to automotive exhaust systems was most speculative on December 18, 1964, when this Court sustained defendants' objections, it is apparent now that plaintiffs are entitled to discovery thereon. Summary judgment is a strong remedy, to be applied with great restraint only upon a clear showing that no material facts are in genuine controversy. Where a party has been denied discovery in what later appears to be a critical area, especially on defendants' representation that said area is irrelevant, it cannot be said that the facts have been sufficiently developed to merit summary judgment consideration.

We shall therefore deny summary judgment on Count III of the Complaint at this juncture, without prejudice, require defendants to answer Interrogatory 34(a), (b) and (c) dealing with automotive exhaust parts, within ten days, and permit defendants, if they so desire, to refile the instant motion thereafter. It must be noted, however, that the foregoing does not in any way affect the judgment we have this day ordered in favor of defendants on Counts I and II.

ENTER:

Abraham L. Marovitz,
Judge.

Dated: February 25, 1966.